Supreme Court, U.S.
FILED
SEP - 6 2016
OFFICE OF THE CLERK

No. 15-606

In the Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ, PETITIONER

v.

STATE OF COLORADO

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General
WILLIAM A. GLASER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the prohibition in Colorado Rule of Evidence 606(b) on the impeachment of jury verdicts with testimony about jurors' statements during deliberations violates the Sixth Amendment right to an impartial jury in cases in which litigants seek to offer evidence of statements in jury deliberations to prove racial bias.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
A. Common-law and statutory background 2
B. Petitioner's case 5
Summary of argument 9
Argument:
A defendant has no Sixth Amendment right to impeach a verdict with evidence of racially biased statements during jury deliberations 13
A. Rule 606(b) is a constitutional means of serving important social interests in the integrity of the jury system 14
B. Rule 606(b) may be applied to foreclose impeachment of jury verdicts with statements made in deliberations in cases in which litigants seek to prove racial bias 17
1. The public interests underlying Rule 606(b) are present when the rule is applied to foreclose inquiry into deliberations to determine whether a juror was racially prejudiced 17
2. Pre-trial, in-trial, and post-trial mechanisms are available to safeguard against racial bias 24
3. Because the Sixth Amendment forbids all forms of partiality and misconduct, no race-specific rule is appropriate 34
Conclusion 35
Appendix A — Federal district court rules barring litigants from contacting jurors following trial without judicial permission or barring jurors from disclosing deliberations 1a
Appendix B — Pattern jury instructions that advise jurors to set aside biases and prejudices 9a
Appendix C — Federal Rule of Evidence 606(b) 15a

TABLE OF AUTHORITIES

Cases: Page

Batson v. *Kentucky*, 476 U.S. 79 (1986) 35
Bryant v. *Mattel, Inc.*, No. 04-CV-09049, 2008 WL 3367605 (C.D. Cal. Aug. 8, 2008) 31
Dietz v. *Bouldin*, 136 S. Ct. 1885 (2016) 22, 23
Engle v. *Isaac*, 456 U.S. 107 (1982) 22
Fulghum v. *Ford*, 850 F.2d 1529 (11th Cir. 1988), cert. denied, 488 U.S. 1013 (1989) 33
Ham v. *South Carolina*, 409 U.S. 524 (1973) 25
Holmes v. *South Carolina*, 547 U.S. 319 (2006) 14
Hyde v. *United States*, 225 U.S. 347 (1912) 3, 18, 34
J.E.B. v. *Alabama*, 511 U.S. 127 (1994) 35
Jimenez v. *Heyliger*, 792 F. Supp. 910 (D.P.R. 1992) 32
Love v. *Yates*, 586 F Supp. 2d 1155 (N.D. Cal. 2008) 31
McDonald v. *Pless*, 238 U.S. 264 (1915) 2, 3, 18, 20, 32
McDonough Power Equip., Inc. v. *Greenwood*, 464 U.S. 548 (1984) 16, 33, 34
People v. *Jones*, 475 N.E.2d 832 (Ill. 1985) 32
People v. *Stevens*, No. A119073, 2012 WL 758035 (Cal. Ct. App. Mar. 9, 2012) 31
People v. *Wilson*, 187 P.3d 1041 (Cal. 2008) 31
Ristaino v. *Ross*, 424 U.S. 589 (1976) 25, 27
Rosales-Lopez v. *United States*, 451 U.S. 182 (1981) ... 25, 27
State v. *Evans*, 756 N.W.2d 854 (Minn. 2008) 32
State v. *Jones*, 29 So. 3d 533 (La. Ct. App. 2009) 31
State v. *Miera*, 966 P.2d 1115 (Idaho Ct. App. 1998) 31
State v. *Varner*, 643 N.W.2d 298 (Minn. 2002) 32
Tanner v. *United States*, 483 U.S. 107 (1987) ..... *passim*

Cases—Continued: Page

Thompson v. *Quarterman*, 629 F. Supp. 2d 665 (S.D. Tex. 2007) 32
Turner v. *Murray*, 476 U.S. 28 (1986) 25
Turner v. *Pollard*, No. 13-CV-731, 2014 WL 5514169 (E.D. Wis. Oct. 31, 2014) 31
United States v. *Henley* 238 F.3d 1111 (9th Cir. 2001), abrogated on other grounds by *Warger* v. *Shauers*, 135 S. Ct. 524 (2014) 33
United States v. *Patterson*, No. 04-CR-705-1, 2007 WL 1438658 (N.D. Ill. May 15, 2007), aff'd 397 Fed. Appx. 209 (7th Cir. 2010) 32
United States v. *Scheffer*, 523 U.S. 303 (1998) 14
United States v. *Sotelo*, 97 F.3d 782 (5th Cir.), cert. denied, 519 U.S. 1045 (1996), 519 U.S. 1135, and 520 U.S. 1149 (1997) 31
United States v. *Voigt*, 877 F.2d 1465 (10th Cir.), cert. denied, 493 U.S. 982 (1989) 33
Vaise v. *Delaval*, (1785) 99 Eng. Rep. 944 (K.B.) 2, 18, 20, 32, 34
Warger v. *Shauers*, 135 S. Ct. 521 (2014) ..... *passim*

Constitution, statutes, and rules:

U.S. Const.:
Amend. VI ..... *passim*
Amend. XIV (Equal Protection Clause) 34
Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 4
Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1934 4
Fed. R. Civ. P 47(a) 27
Fed. R. Crim. P. 24(a) 27

Rules—Continued: Page

Fed. R. Evid.:

Rule 606(b) (1975) 4

Rule 606(b) ..... *passim*

Rule 606(b) advisory committee's note 28

Colorado R. Evid. 606(b) ..... *passim*

Miscellaneous:

1 Kenneth S. Broun, *McCormick on Evidence* (7th ed. 2013) 14

Ellen S. Cohn et al., *Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes*, 39 J. Applied Soc. Psychol. 1953 (2009) 28

James W. Diehm, *Impeachment of Jury Verdicts: Tanner v. United States and Beyond*, 65 St. John's L. Rev. 389 (1991) 23

Alyson A. Grine & Emily Coward, *Raising Issues of Race in North Carolina Criminal Cases* (2014), http://defednermanuals.sog.unc.edu/race/8-addressing-race-trial 26

H.R. 5463, 93d Cong., 1st Sess. (1973) 4

H.R. Rep. No. 650, 93d Cong., 1st Sess. (1973) 4

Hon. Gregory E. Mize et al., *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report* (2007), http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx 27

Jeff Robinson & Jodie English, *Confronting the Race Issue in Jury Selection*, The Advocate, May 2008, http://apps.dpa.ky.gov/library/advocate/pdf/2008/adv050108.pdf 26

1 Leonard B. Sand, et al., *Modern Federal Jury Instructions: Criminal* (2016) 30

Miscellaneous—Continued: Page

Regina A. Schuller et al., *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 Law & Hum. Behav. 320 (2009) 28

Rule of Evidence for United States Courts & Magistrates, 56 F.R.D. 183 (1972) 4

S. Rep. No. 1277, 93d Cong., 2d Sess. (1974) 4, 18, 20, 22

Samuel R. Sommers & Phoebe C. Ellsworth, Symposium, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 Chi. -Kent L. Rev. 997 (2003) 28

Uniform R. Evid. 606(b) (1999) 5

Wisconsin State Pub. Defender's Office, *Talking to Juries About Race: Building Theories & Themes Around Racial Issues at Trial*, http://wispd.org/attachments/article/254/Building%20Theories%20and%20Themes%20around%20Racial%20Issues%20at%20Trial-%20Talking%20to%20Juries%20about%20Race.pdf 26

In the Supreme Court of the United States

No. 15-606

MIGUEL ANGEL PEÑA RODRIGUEZ, PETITIONER

v.

STATE OF COLORADO

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case involves the constitutionality of Colorado Rule of Evidence 606(b) as applied to allegations that a juror made racially biased statements during deliberations. Colorado Rule of Evidence 606(b) parallels Federal Rule of Evidence 606(b) (App. C, *infra*, 15a), which applies in federal criminal prosecutions and civil actions to which the United States is a party. The United States therefore has a substantial interest in the resolution of this case.

STATEMENT

Colorado generally prohibits impeachment of jury verdicts with evidence concerning statements that jurors made during deliberations, while providing other mechanisms that litigants may use before, during, and after trial to protect the right to a fair and impartial jury. That approach reflects a centuries-old accommodation of fair-trial interests. And it is con-

sistent with the Sixth Amendment, whether the statements from deliberations that a litigant seeks to admit bear on racial prejudice or on other types of bias or misconduct.

A. Common-Law And Statutory Background

1. The principle that evidence concerning statements during jury deliberations may not be used to impeach a verdict goes back more than 200 years. It dates at least to *Vaise* v. *Delaval*, (1785) 99 Eng. Rep. 944 (K.B.), in which a party sought to set aside a verdict by offering an "affidavit from two jurors claiming that the jury had decided the case through a game of chance." *Warger* v. *Shauers*, 135 S. Ct. 521, 526 (2014). Lord Mansfield acknowledged that submitting a verdict to chance would be "a very high misdemeanor," but concluded that the court could not consider jurors' affidavits to impeach the verdict. *Vaise*, 99 Eng. Rep. at 944.

That principle "took root in the United States," *Warger*, 135 S. Ct. at 526, in decisions in which this Court and others concluded that the interests served by protecting the confidentiality of jury deliberations outweighed the benefits of impeaching final judgments with evidence from those deliberations. For instance, in *McDonald* v. *Pless*, 238 U.S. 264 (1915), this Court wrote that the principle of *Vaise* "chooses the lesser of two evils" in light of "conflicting considerations" of justice. *Id.* at 267. One consideration was the interest in identifying cases in which "the jury adopted an arbitrary and unjust method in arriving at their verdict." *Ibid.* But other considerations weighed against admitting evidence from deliberations: If "what was intended to be a private deliberation" was made "the constant subject of public inves-

tigation," the Court explained, the result would be "the destruction of all frankness and freedom of discussion and conference." *Id.* at 267-268. Further, the Court reasoned, allowing statements from deliberations to be used to impeach verdicts "would open the door to the most pernicious arts and tampering with jurors," from which "no verdict would be safe." *Id.* at 268 (citations omitted).

In view of that calculus, this Court held in *McDonald* that juror testimony concerning what occurred during deliberations could not be offered to show that a verdict was reached through an unlawful method (a "quotient verdict," in which jurors set damages by averaging the amounts each juror thought appropriate). 238 U.S. at 265-269. That decision reflected what was known as the "federal approach," under which evidence of statements in jury deliberations could not be used to impeach a verdict unless the evidence "was offered to show that an 'extraneous matter,'" such as influence from a person or materials outside the jury itself, "had influenced the jury." *Warger*, 135 S. Ct. at 526-527 (internal quotation marks omitted). The Court similarly held in *Hyde* v. *United States*, 225 U.S. 347 (1912), that jurors could not testify that members of a divided jury had agreed to convict two defendants in exchange for other jurors' agreeing to acquit two others. *Id.* at 382-384.

2. The Federal Rules of Evidence adopted the limited federal approach to the use of juror statements, with no exception for any type of bias or prejudice. This Court promulgated draft Federal Rules of Evidence that barred jurors from offering evidence as to "any matter or statement occurring during the course of the jury's deliberations"—subject only to the set-

tled common-law exceptions for testimony on "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 265 (1972).

Congress agreed that this Court's proposed rule best accommodated competing fair-trial interests. Congress initially prevented the proposed Rules of Evidence from taking automatic effect, Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9, and then considered a variety of changes. The House Judiciary Committee proposed that the prohibition on impeachment of verdicts be narrowed to bar only testimony of a juror concerning "the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith." H.R. 5463, 93d Cong., 1st Sess., 33 (1973); see H.R. Rep. No. 650, 93d Cong., 1st Sess. 9-10 (1973). But the Senate Judiciary Committee opposed the change, reasoning that it would hinder the "full and free debate necessary to the attainment of just verdicts," unduly undermine finality, and "permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors." S. Rep. No. 1277, 93d Cong., 2d Sess. 14 (1974) (*Senate Report*). Congress adopted the Senate approach. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1934; see Fed. R. Evid. 606(b) (1975) (generally barring juror testimony as to "any matter or statement occurring during the course of the jury's deliberations").

The National Conference of Commissioners of Uniform State Laws recommended the same common-law based balance. See Uniform R. Evid. 606(b) (1999). While state laws vary in their details, States have uniformly chosen to adopt some form of no-impeachment rule, and only a minority have interpreted their laws to authorize use of evidence of what was said in deliberations in order to establish racial bias. See Indiana et al. Amicus Br. 6-9, 1a-6a (identifying 12 States that permit such impeachment and one State in which intermediate appellate courts have allowed such impeachment).

B. Petitioner's Case

1. In 2007, three teenage sisters entered a bathroom at a race track in Colorado. 02/24/10 Tr. 5, 12-13. A man whom the girls had seen outside the bathroom followed them inside and asked if they wanted to "drink or party." *Id.* at 14-15. The girls said no, and one of them immediately left the bathroom. *Id.* at 15-16. The other two girls thought the man would leave, but he instead turned off the lights and grabbed them. *Id.* at 16-17. One girl felt his hand on her lower back and buttocks as he pulled her closer. *Id.* at 18, 52. The other felt his hand start on her shoulder and move toward her breast. *Id.* at 106, 109. After a struggle, the girls freed themselves and left the bathroom. *Id.* at 19-20, 109.

Based on the girls' descriptions, the girls' father recognized the assailant as petitioner, whom he had spoken to earlier that day. 02/24/10 Tr. 138-139, 143-144. The father informed a security guard of the assaults, and while he and the guard were speaking, he saw petitioner speed away in a pickup truck. *Id.* at 145-148. Sheriff's deputies located petitioner later

that night, and the two girls each identified him during separate one-on-one show-ups. *Id.* at 22-23, 112, 172-173, 182-187.

2. a. The State charged petitioner with felony attempted sexual assault, unlawful sexual contact, and two misdemeanor counts of harassment. D. Ct. R. 28-29.

In advance of trial, the district court distributed questionnaires to jurors seeking written responses to preliminary questions. See J.A. 13-14. Thereafter, the court conducted in-person voir dire, in which it asked questions and then permitted attorneys to question the venire directly. Before opening the floor to the attorneys, the judge advised defense counsel that "in the past, some of our jurors have been vocal in their dislike of people who aren't in the country legally. So I don't know if that's an issue for you or your client, but you may want to address it." J.A. 16. During voir dire, however, petitioner's counsel did not ask any questions about race, ethnicity, national origin, or immigration status. J.A. 23-35.

The case proceeded to trial. Both victims identified petitioner at trial as the man who had entered the bathroom and grabbed them. 02/24/10 Tr. 16, 104. Petitioner's counsel put forward the theory that the girls had misidentified petitioner, relying on testimony from a friend of petitioner that petitioner had been visiting him in a nearby stable at the time of the assault. 02/25/10 Tr. 16-17, 50-59.

At the close of trial, the district court provided the parties with draft instructions and offered an opportunity to propose changes. See 02/25/10 Tr. 5-12. The court's instructions charged that jurors' decisions "must be made by applying the rules of law which I

give you to the evidence presented at trial." J.A. 54. The court further instructed that "[n]either sympathy nor prejudice should influence your decision." *Ibid.* The instructions directed jurors "not to allow gender bias or any kind of prejudice based upon gender to influence your decision," but did not address bias based on race, ethnicity, or national origin. J.A. 57. Neither party requested a charge on these forms of bias. 02/25/10 Tr. 5-12.

The jury convicted petitioner on the misdemeanor counts but could not reach a verdict on the felony count. J.A. 70-71. The court sentenced petitioner to two years of supervised probation. J.A. 6.

b. After trial, two jurors approached defense counsel and alleged that another juror (Juror 11 or "H.C.") made statements during deliberations that reflected ethnic prejudice. Petitioner's counsel subsequently obtained affidavits from those two jurors recounting the alleged statements. The first juror stated that H.C. had said that he thought petitioner "did it because he's Mexican and Mexican men take whatever they want," and that Mexican men "have a sense of entitlement and think they can 'do whatever they want' with women." J.A. 151. The second juror stated that H.C. had said that he believed that petitioner "was guilty because, in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." J.A. 151-152. That affidavit alleged that H.C. stated that when he was a law-enforcement officer, "nine times out of ten, Mexican men were guilty of being aggressive toward women and young girls." J.A. 152. The juror stated that H.C. also expressed the belief that petitioner's alibi witness

was not credible "because, among other things, he was 'an illegal.'" *Ibid.*

Petitioner moved for a new trial, relying on the allegations concerning H.C.'s statements in deliberations. Petitioner invoked the Sixth Amendment principles that a defendant is entitled to a "fair and impartial" jury and that a defendant may be entitled to a new trial when a juror made misrepresentations during voir dire concerning biases that would have justified removal from the jury. D. Ct. R. 272; see *id.* at 274-275.

The district court denied petitioner's motion. J.A. 150-160. The court explained that the only evidence petitioner had offered that H.C. harbored ethnic bias consisted of affidavits concerning "statements during deliberations." J.A. 160. Those statements, the court explained, could not "weigh in the determination of whether Juror No. 11 failed to disclose * * * alleged bias during voir dire" because use of statements from jury deliberations to impeach a verdict was barred by Colorado Rule of Evidence 606(b). *Ibid.*; see J.A. 158.

3. The Colorado Court of Appeals affirmed, concluding that petitioner's challenge to application of Colorado Rule of Evidence 606(b) was waived. Pet. App. 28a-64a. The court noted that petitioner had chosen not to ask questions "about racial bias during voir dire," and it found "no reason to conclude here that diligent voir dire would have left [petitioner's] rights to a jury free of racial bias unprotected." *Id.* at 50a-51a. The court found that petitioner's failure to "use reasonable diligence during jury selection" barred his challenge to application of Colorado Rule of Evidence 606(b). *Id.* at 53a.

4. The Colorado Supreme Court affirmed, over the dissent of three justices. Pet. App. 1a-16a. The court concluded that Colorado Rule of Evidence 606(b) barred the impeachment of a jury verdict with evidence of racially prejudiced statements during deliberations, *id.* at 6a-11a, and that the rule did not violate petitioner's rights under the Sixth Amendment, *id.* at 11a-16a. It noted that *Tanner* v. *United States*, 483 U.S. 107 (1987), and *Warger*, 135 S. Ct. at 528, had rejected Sixth Amendment challenges to applications of nearly identical evidentiary shields. Pet. App. 12a-14a. Those decisions, the court observed, reasoned that prohibitions on the use of evidence of statements or conduct in deliberations, such as Colorado Rule of Evidence 606(b), served important public policies. Pet. App. 12a-14a. The court further observed that *Tanner* and *Warger* emphasized that litigants had other mechanisms to protect the right to a fair and impartial jury. *Ibid.*

The Colorado Supreme Court concluded that while *Tanner* and *Warger* involved misconduct other than racial bias, it could not "discern a dividing line between different *types* of juror bias or misconduct" that would necessitate a different Sixth Amendment analysis. Pet. App. 14a-15a. Further, it observed, the safeguards deemed sufficient to protect the impartial-jury right in *Tanner* and *Warger* were present when the form of partiality alleged was racial or ethnic bias. *Id.* at 15a.

SUMMARY OF ARGUMENT

Colorado Rule of Evidence 606(b) does not violate the Sixth Amendment when applied to prevent litigants from impeaching verdicts with juror testimony about racially biased statements during deliberations.

A. State and federal lawmakers have broad constitutional latitude to enact evidentiary rules that balance competing interests of justice. These rules may exclude even relevant evidence to serve important public interests. In view of that principle, this Court has twice upheld against constitutional challenge applications of a federal evidentiary rule paralleling Colorado Rule of Evidence 606(b)—a federal rule that this Court promulgated and Congress enacted that contains no exceptions for particular kinds of bias. *Warger* v. *Shauers*, 135 S. Ct. 521 (2014); *Tanner* v. *United States*, 483 U.S. 107 (1987). This Court has reasoned that the limits of Rule 606(b) protect important fair-trial interests and that alternative mechanisms remain available to safeguard the right to a fair and impartial jury.

B. Colorado Rule of Evidence 606(b) is constitutional when it is applied to bar jurors from testifying regarding statements in deliberations in order to impeach verdicts based on claims of racial bias.

1. The interest in full and frank discussion in the jury room furthered by Rule 606(b) would be disserved by permitting litigants to impeach jury verdicts based on allegations of racially biased statements in deliberations. Jurors engaged in heated discussions may reasonably fear that even unprejudiced views could be misunderstood as reflecting racial bias—particularly in cases that themselves touch on racial discrimination. Especially because of the social opprobrium that attaches to racial prejudice, petitioner's proposed post-trial inquiries risk chilling the honest and unprejudiced exchange of views.

Rule 606(b) also serves interests in preventing harassment of jurors and post-verdict juror tampering. A

race-related exception would create the same incentive for harassment and tampering as would an exception enabling litigants to overturn verdicts based on juror accounts of other prejudicial statements or misconduct in deliberations.

Rule 606(b) likewise serves society's interest in finally resolving cases—an interest that is present whether a post-verdict claim pertains to racial bias or to other types of jury-room prejudice or misconduct. The argument that a race-related exception would be narrow and that no-impeachment rules already have exceptions could just as easily have justified the exception sought in *Tanner*. But the Court gave weight to finality interests there, and the same analysis applies here.

Finally, as in *Tanner*, opening up new avenues for challenging jury verdicts based on accounts of what was said in deliberations would undermine "the community's trust in a system that relies on the decisions of laypeople." 483 U.S. at 121. Rule 606(b) avoids the erosion of public confidence that can result from post-trial attacks that are based on often-disputed claims about what transpired during deliberations.

2. The alternative safeguards of the right to a fair and impartial jury that *Tanner* and *Warger* emphasized are at least as effective with respect to racial prejudice as with respect to other types of partiality and misconduct.

This Court has understood voir dire as a particularly important safeguard against racial bias. The Court's decisions requiring and recommending opportunities for questioning on racial prejudice reflect the understanding that questioning jurors under oath is an effective way of identifying those who harbor racial

biases. Trial courts do have broad discretion over the scope of voir dire on this subject. But trial courts have broad discretion over voir dire on every subject, not simply questions related to race, yet this Court has nevertheless treated voir dire as an important safeguard of jury impartiality.

The additional safeguards this Court has identified are no less potent with respect to racial bias than they are with respect to many other types of prejudice and misconduct. Jurors can (and do) report racial bias in deliberations prior to verdict, just like other forms of misconduct. The likelihood of such reporting is enhanced by jury instructions that all but invariably warn jurors that bias and prejudice are prohibited, and by the social opprobrium attached to racist views.

Non-jurors may also report bias or misconduct during trial. That safeguard is at least as available for racial prejudice as for many other forms of jury-room misconduct or bias, such as the use of impermissible methods like a coin flip or quotient verdict in *Vaise* and *McDonald* and the pro-defendant bias alleged in *Warger*. Indeed, cases reflect that jurors who have racially prejudiced reactions during trial may express those reactions in the presence of court personnel, attorneys, or observers.

Finally, the right to an impartial jury is protected by litigants' ability to impeach final judgments with nonjuror evidence of misconduct. That safeguard is present with respect to racist jurors, because jurors who articulate racist attitudes inside the jury room will often express them outside the courtroom. When a juror's out-of-court statements establish that the juror misrepresented his or her ability to be fair and

impartial, Rule 606(b) does not prevent impeachment of the verdict after trial.

3. The Sixth Amendment does not support departing from the framework of *Tanner* when the type of juror partiality alleged is racial bias, rather than another form or prejudice or misconduct. The Sixth Amendment guarantees the right to a fair and impartial jury. That guarantee is violated whenever jurors decide a case using bias, prejudice, or arbitrary decision-making methods. The Amendment does not distinguish between racial bias and other types of partiality.

ARGUMENT

A DEFENDANT HAS NO SIXTH AMENDMENT RIGHT TO IMPEACH A VERDICT WITH EVIDENCE OF RACIALLY BIASED STATEMENTS DURING JURY DELIBERATIONS

Colorado Rule of Evidence 606(b) embodies a long-standing balance between competing fair-trial considerations. The rule protects finality values and the integrity of deliberations by barring use of evidence of jurors' statements or conduct during deliberations in order to impeach a verdict, while leaving open alternative avenues to safeguard the right to a fair and impartial jury. In related contexts, this Court has twice rejected constitutional challenges to substantively identical bans on offering evidence of juror statements or conduct during deliberations to impeach a verdict. It has reasoned that such rules advance important public policies without unduly impinging on Sixth Amendment interests. That analysis applies here. Racial bias in deliberations is odious, but alternative mechanisms exist to protect a defendant's right to an impartial jury without sacrificing the values furthered by Rule 606(b).

A. Rule 606(b) Is A Constitutional Means of Serving Important Social Interests In The Integrity of the Jury System

"State and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence" in court proceedings. *Holmes* v. *South Carolina*, 547 U.S. 319, 324 (2006) (brackets omitted) (quoting *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998)). Some rules exclude evidence based on a judgment about reliability. See, *e.g.*, *Scheffer*, 523 U.S. at 308-309. But other rules, such as privileges for marital communications, attorney-client communications, and state secrets, exclude highly probative evidence based on competing social policies. 1 Kenneth S. Broun, *McCormick on Evidence* § 72, at 466-467 (7th ed. 2013). This Court has accorded lawmakers flexibility in balancing these competing values—even when litigants wish to offer evidence to vindicate constitutionally significant interests. For instance, this Court has held that when a defendant seeks to offer evidence during a criminal trial itself, application of a state evidentiary prohibition is unconstitutional only if it both "infring[es] upon a weighty interest of the accused," and is "'arbitrary' or 'disproportionate to the purposes [the rule is] designed to serve.'" *Holmes*, 547 U.S. at 324 (citations omitted).

This Court has similarly respected lawmakers' balancing of policy considerations in addressing post-trial claims under the Sixth Amendment. In *Warger* v *Shauers*, 135 S. Ct. 521, 528 (2014), and *Tanner* v. *United States*, 483 U.S. 107 (1987), the Court upheld applications of Federal Rule of Evidence 606(b) to bar the impeachment of verdicts with jurors' testimony concerning their deliberations, relying on the compel-

ling interests furthered by the rule and the availability of other mechanisms to safeguard the right to a fair and impartial jury.

Tanner rejected a Sixth Amendment challenge to application of Federal Rule of Evidence 606(b) to bar consideration of jurors' testimony that jurors used cocaine and marijuana and consumed alcohol during trial. 483 U.S. at 115-116. The Court did not doubt that the allegations, if proven, could establish a Sixth Amendment violation, because "a defendant has a right to 'a tribunal both impartial and mentally competent to afford a hearing.'" *Id.* at 126 (citation omitted). But the Court noted that "long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." *Id.* at 127.

Drawing from the common-law cases, the Court noted that these interests include promoting "full and frank discussion in the jury room," ensuring "jurors' willingness to return an unpopular verdict," *Tanner*, 483 U.S. at 120, preventing "harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors," *id.* at 124, the protection of finality, *ibid.*, and preserving "the community's trust in a system that relies on the decisions of laypeople," *id.* at 121. The Court further noted that even when jurors' testimony concerning their deliberations is disallowed, "Sixth Amendment interests in an unimpaired jury * * * are protected by several aspects of the trial process," including voir dire, the ability of fellow jurors to observe each other and report inappropriate conduct before verdict, and the opportunity for impeachment with nonjuror evidence. *Id.* at 127. Taking these

considerations together, the Court found no constitutional violation from application of Rule 606(b). *Ibid.*

The Court reaffirmed that analysis in *Warger*. The petitioner in *Warger* sought to offer evidence of statements during jury deliberations to prove that he was denied his right to an impartial jury—there, on the ground that statements during deliberations established that a juror had "deliberately lied during *voir dire* about her impartiality and ability to award damages." 135 S. Ct. at 524.[1] This Court recognized that "[t]he Constitution guarantees both criminal and civil litigants a right to an impartial jury," *id.* at 528, but nevertheless held that Rule 606(b) could constitutionally bar the use of statements during jury deliberations to establish a violation of that right. As in *Tanner*, the Court emphasized, "a party's right to an impartial jury remains protected despite Rule 606(b)'s removal of one means of ensuring that jurors are unbiased." *Warger*, 135 S. Ct. at 529. While declining to decide whether there were "cases of juror bias so extreme that * * * the usual safeguards * * * are not sufficient to protect the integrity of the process," *id.* at 529 n.3, the Court found no constitutional violation on the facts before it.

---

[1] The Constitution requires reversal of a verdict when a juror lies about a material matter in voir dire, if honest answers would have required that the juror be struck for cause. *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 556 (1984).

B. Rule 606(b) May Be Applied To Foreclose Impeachment Of Jury Verdicts With Statements Made In Deliberations In Cases In Which Litigants Seek to Prove Racial Bias

The analysis in *Tanner* and *Warger* controls here. Those cases establish that the rules generally barring jurors from testifying about statements in deliberations serve important public interests. And they establish that the right to an impartial jury can be protected through other safeguards. Because the public interests that undergird no-impeachment rules are present here, and the alternative mechanisms for safeguarding an impartial jury are also present, this Court's analysis requires the conclusion that Rule 606(b) may be constitutionally applied when a litigant's Sixth Amendment claim is one pertaining to racial bias.

1. The public interests underlying Rule 606(b) are present when the rule is applied to foreclose inquiry into deliberations to determine whether a juror was racially prejudiced

For hundreds of years, courts and legislatures have concluded that weighty public interests are served by barring the use of evidence from jury deliberations in order to impeach verdicts. These public interests are fully present when a litigant seeks to offer evidence of racially prejudiced statements in jury deliberations—just as when a litigant seeks to offer evidence from deliberations to establish other types of juror partiality or misconduct.

a. Barring impeachment of jury verdicts with accounts of what was said in jury deliberations serves the public interest in "full and frank discussion in the jury room," which would "be undermined by a barrage

of postverdict scrutiny of juror conduct." *Tanner*, 483 U.S. at 120-121. This Court has recognized that interest for more than a century. *McDonald* v. *Pless*, 238 U.S. 264, 267-268 (1915). And Congress emphasized that interest when it adopted Rule 606(b) as promulgated by this Court, see *Tanner*, 483 U.S. at 122—a rule that barred impeachment of verdicts with evidence from deliberations in all cases, except those falling under the longstanding common-law exceptions for extraneous influences. *Senate Report* 14 ("[C]ommon fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation.").

The public interest in ensuring full and frank jury discussion by shielding deliberations is furthered in the same way whether a litigant seeks to introduce evidence to establish racial bias; intoxication, *Tanner*, 483 U.S. at 121; the use of a coin-flip to decide a verdict, *Vaise* v *Delaval*, (1785) 99 Eng. Rep. 944, 944 (K.B.); or a deal to convict some defendants in exchange for acquitting others, *Hyde* v. *United States*, 225 U.S. 347, 383-384 (1912). Indeed, full and fair debate is most likely to be chilled when jurors may reasonably fear that legitimate, honest, and unprejudiced expressions will be confused with the form of misconduct that would be made the subject of post-trial impeachment inquiries. Post-trial inquiries based on claims asserting racially prejudiced statements in deliberations may be particularly chilling—more so than inquiries into drinking or drug use or arbitrary decision-making methods like coin-flips. That is because full and fair deliberations may some-

times appropriately involve discussion of race—for instance, when claims of discriminatory conduct are directly or indirectly at issue. While racial prejudice in such conversations is always improper, jurors engaged in heated and sensitive discussions in cases touching on racial discrimination may reasonably fear that even unprejudiced expressions could be misunderstood as reflecting bias.

Indeed, the likelihood of chilling legitimate debate through post-trial inquiries is enhanced by the extraordinary opprobrium that petitioner acknowledges attaches to expressions of racial prejudice. See, *e.g.*, Pet. Br. 27. Given that opprobrium, jurors are more likely to be concerned that they will be mistakenly accused of racism in post-verdict hearings than that they will be mistakenly accused of being biased in favor of tort defendants, for example. *Warger*, 135 S. Ct. at 524. And to the extent that jurors remain silent or guarded, the exception petitioner seeks will produce the harms to deliberations that Rule 606(b) seeks to avoid.

Petitioner raises no challenge to the interest in full and fair debate that presents grounds specific to racial prejudice; his arguments instead amount to quarrels with the hundreds of years of judicial and legislative judgments underlying the common-law approach. Petitioner first suggests (Br. 34) that the interest in ensuring full and fair debate is not implicated in cases of racial bias because "there is no valid interest in creating breathing space for jurors to argue that a defendant should be convicted because of her race." But the interest served by Rule 606(b) is never an interest in creating breathing space for prejudice or misconduct. For instance, barring testimony about

other forms of partiality, *Warger*, 135 S. Ct. at 524, intoxication, *Tanner*, 483 U.S. at 121, or use of arbitrary decision-making methods, *e.g.*, *Vaise*, 99 Eng. Rep. at 944, does not reflect a policy of condoning such conduct. Instead, the application of Rule 606(b) with respect to such claims is designed to safeguard legitimate deliberations against chilling effects. The same is true of the application of Rule 606(b) here.

Petitioner also suggests (Br. 34-35) that hearings concerning whether racial bias existed in the jury room are unlikely to deter legitimate deliberations because statements in deliberations can be disclosed through the narrow class of impeachment inquiries allowed under Rule 606(b) and through jurors' statements to nonjudicial sources. But this Court has long recognized in cases such as *Tanner*, *McDonald*, and *Hyde* that an interest in full and fair debate is served by the common-law rule notwithstanding its narrow extraneous-influence exception and the possibility of disclosures in non-judicial forums. Indeed, petitioner's argument about other avenues for disclosure was pressed by the petitioner in *Warger* two years ago, where the Court nevertheless rejected a constitutional exception to the common-law rule safeguarding juror deliberations. 135 S. Ct. at 528.

b. The limits in Rule 606(b) also protect against harassment of jurors and against post-verdict jury tampering. *Tanner*, 483 U.S. at 119-120; *McDonald*, 238 U.S. at 268; see *Senate Report* 13. Opening the door for invalidation of verdicts on the ground that a juror made statements reflecting racial prejudice would create the same incentive for tampering and harassment as opening the door for invalidation based on alleged misconduct such as the pro-defendant bias

in *Warger*, arbitrary decision-making methods in *McDonald* and *Hyde*, and drinking and drug use in *Tanner*.

Petitioner's arguments to the contrary are all arguments that could have just as easily been made in cases like *Tanner* and *Warger*. Petitioner first argues (Br. 36) that Rule 606(b) does not genuinely serve the interest in preventing tampering and harassment because professional responsibility rules exist as an alternative safeguard against such conduct. But professional responsibility rules and the common-law evidentiary limits work hand in hand. Many jurisdictions—including about two-thirds of federal districts—have rules that prohibit attorneys from contacting jurors except upon prior permission of the court (which can often be granted only based on a showing of cause). App. A, *infra.*, 1a-8a. Rule 606(b) reinforces these rules, ensuring that convicted defendants and losing civil litigants who might have incentive to violate rules barring juror contact cannot benefit from violations. Petitioner's proposed constitutional rule, moreover, would be difficult to reconcile with these limits on juror contact, because it would mandate the admission of evidence that litigants would commonly be barred from even attempting to acquire.

The common-law no-impeachment rule is at least as important in jurisdictions that allow post-trial contact with jurors—again by removing the incentive to harass and tamper with jurors during any contact. Petitioner suggests (Br. 36) that the common-law rule has little value in such jurisdictions because attorneys have incentive to contact jurors based on interests in "professional development" and "curiosity" regardless of whether no-impeachment rules exist. But while

"professional development" and "curiosity" may prompt some lawyers to talk to jurors, those motives provide no reason for attorneys or losing parties to tamper with jurors or to persist in unwanted contact with those who do not want to talk to counsel.

Petitioner finally argues (Br. 37) that courts and legislators have simply been wrong to conclude that tampering or harassment "is a problem" in the first place, asserting that no "discernible harassment effect" exists in jurisdictions that do not adhere to Rule 606(b). But petitioner cites no data undercutting the common-sense inference that reducing incentives for harassment and tampering will reduce the frequency of that misconduct. And the judgment of courts and legislatures has been that broader impeachment rules do encourage harassment and tampering. See, *e.g.*, *Tanner*, 483 U.S. at 123; *Senate Report* 13-14.

c. No-impeachment rules also serve finality. New avenues for challenging final judgments upset settled expectations, consume societal resources, and risk "degrad[ng] the prominence of the trial itself" by undercutting incentives to promptly identify misconduct. *Engle* v. *Isaac*, 456 U.S. 107, 127 (1982). These concerns are heightened by the reality that accurate adjudication is hindered by the passage of time. *Id.* at 127-128 (emphasizing strong finality interests where "[p]assage of time, erosion of memory, and dispersion of witnesses" may hinder proceedings).

This Court's analysis in *Dietz* v. *Bouldin*, 136 S. Ct. 1885 (2016), confirms the hazards of post-trial inquiries into what occurred in the jury room "days, weeks, or months after the verdict," *Tanner*, 483 U.S. at 120. See *Dietz*, 136 S. Ct. at 1894. Once jurors "tak[e] off their juror 'hats' and return[] to their lives," this

Court emphasized, they "may begin to forget key facts" surrounding the case. *Ibid.* Moreover, jurors may face hostile public reaction, disappointment from friends or family, and anger from victims or defendants that lead them to "begin to reconsider their decision." *Ibid.* Such jurors may second-guess the motives behind their fellow jurors' decisions in a way that influences their inevitably fading recollections of what was said. And even jurors who experience no second thoughts may "make inaccurate statements to avoid a confrontation, to disassociate themselves from what is perceived to be an unpopular verdict, or simply to escape from the" presence of a dissatisfied attorney, litigant, or community member. James W Diehm, *Impeachment of Jury Verdicts:* Tanner v. United States *and Beyond*, 65 St. John's L. Rev. 389, 398-399 (1991).

Petitioner contends (Br. 38-39) that application of Rule 606(b) does not serve significant finality interests because Rule 606(b) by its terms contains exceptions for extraneous influences and clerical errors, and because the exception he proposes is narrow. Those contentions provide no basis for distinguishing *Tanner*'s analysis of finality interests. Congress had enacted the extraneous-influence and clerical-error exceptions to Federal Rule of Evidence 606(b) by the time the Court decided *Tanner*, and the exception that the petitioners in *Tanner* sought concerning drunken and impaired jurors could also be described as narrow. Yet this Court recognized finality as an important interest served by application of Rule 606(b). 483 U.S. at 120.

d. Finally, *Tanner* concluded that opening up jury verdicts to further scrutiny based on credibility con-

tests months or years after the fact undermines "the community's trust in a system that relies on the decisions of laypeople." 483 U.S. at 121. Petitioner's argument that this interest is not present is again irreconcilable with this Court's decisions. Petitioner asserts there is no risk to public confidence from opening up a new avenue of post-verdict scrutiny because "[t]he populace does not expect jurors invariably to behave properly" (Br. 15) and because public confidence in the jury system would be diminished by "turn[ing] a blind eye when evidence shows that jury deliberations were tainted by racial bias" (Br. 44). But these arguments were equally applicable in *Tanner*, where application of Rule 606(b) likewise barred evidence of serious misconduct that would undermine the validity of a verdict. *Tanner* nevertheless recognized that opening new avenues for contested hearings about what was said or done in deliberations to attack a verdict would undercut public confidence rather than enhance it.

2. Pre-trial, in-trial, and post-trial mechanisms are available to safeguard against racial bias

In twice upholding applications of Rule 606(b) against constitutional challenge, this Court has emphasized that while Rule 606(b) forecloses one avenue of identifying bias or misconduct in order to further important public interests, other mechanisms are available before, during, and after trial to protect the right to a fair and impartial jury. *Warger*, 135 S. Ct. at 529; *Tanner*, 483 U.S. at 127. Those safeguards are equally available—and in some cases more available—to address racial prejudice than other forms of bias and misconduct.

a. This Court emphasized the importance of voir dire as a mechanism for safeguarding the right to a fair and impartial jury in *Tanner*, 483 U.S. at 127, and *Warger*, 135 S. Ct. at 529. Voir dire has long been recognized as especially important in safeguarding against racial bias. This Court has thus (1) required that defendants be allowed voir dire concerning racial bias in some cases; (2) required an opportunity for such questioning as a matter of federal supervisory power in other cases; and (3) recommended voir dire on this topic whenever requested by a criminal defendant. *Turner* v. *Murray*, 476 U.S. 28, 36-37 (1986) (requiring opportunity to conduct voir dire on racial attitudes for defendants charged with interracial capital offenses); *Rosales-Lopez* v. *United States*, 451 U.S. 182, 192 (1981) (plurality opinion) (requiring opportunity for voir dire concerning racial attitudes as a matter of federal supervisory power for violent offenses in which the defendant is of one race and the victim is of another); *Ham* v. *South Carolina*, 409 U.S. 524, 527 (1973) (requiring opportunity for such questioning in certain other cases); see *Ristaino* v. *Ross*, 424 U.S. 589, 597 n.9 (1976) ("[T]he wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant."). These decisions requiring opportunities for race-related voir dire in many cases and recommending opportunities for such questioning as a general matter reflect the understanding that—contrary to petitioner's view—voir dire is a critical tool for identifying racially prejudiced jurors.

Practitioners have likewise focused on voir dire as a mechanism for identifying racial prejudice. The strategies that practitioners have developed go well

beyond asking panel members directly whether they harbor prejudices—the method that petitioner disparages (Br. 35) on the ground that it "might be viewed as insulting" (citation omitted).[2] Strategies include "shar[ing] a brief example about a judgment shaped by a racial stereotype," to "give prospective jurors 'permission to admit their own [biased] thinking,'" and "help to begin a conversation in which potential jurors are comfortable discussing racial bias." Alyson A. Grine & Emily Coward, *Raising Issues of Race in North Carolina Criminal Cases* 8-14 (2014), http://defendermanuals.sog.unc.edu/race/8-addressing-race-trial (citation omitted; second set of brackets in original). Another technique involves use of open-ended questions that elicit views and reactions about specific past experiences. *Id.* at 8-15. Yet another is to use multiple choice and free-response questions on written questionnaires that provide jurors with a confidential forum to express their views. *Id.* at 8-17.

Petitioner nevertheless urges this Court to discount voir dire (Br. 24) because while his attorneys were given a free hand to conduct questioning on

---

[2] See, *e.g.*, Jeff Robinson & Jodie English, *Confronting the Race Issue in Jury Selection*, The Advocate 57-62, May 2008, http://apps.dpa.ky.gov/library/advocate/pdf/2008/adv050108.pdf (more than 75 model questions); see also Alyson A. Grine & Emily Coward, *Raising Issues of Race in North Carolina Criminal Cases* 8-18 to 8-22 (2014), http://defendermanuals.sog.unc.edu/race/8-addressing-race-trial (numerous questions and strategies); Wisconsin State Pub. Defender's Office, *Talking to Juries about Race: Building Theories & Themes Around Racial Issues at Trial*, http://wispd.org/attachments/article/254/Building%20Theories%20and%20Themes%20around%20Racial%20Issues%20at%20Trial-%20Talking%20to%20Juries%20about%20Race.pdf (similar model questions).

racial attitudes, trial courts have "broad discretion" over the scope of such questioning. But trial courts *always* have broad discretion to limit voir dire questioning. This Court has nevertheless treated voir dire as an important safeguard against partiality and misconduct in upholding the application of Rule 606(b). Those decisions reflect the fact that, notwithstanding trial courts' discretion as to the manner and method of questioning, courts must allow voir dire adequate to enable the identification and removal of "prospective jurors who will not be able to impartially follow the court's instructions and evaluate the evidence" due to bias or other impediments. *Rosales-Lopez*, 451 U.S. at 188 (plurality opinion). And this Court's reliance on voir dire also reflects practical realities. The overwhelming majority of States permit attorneys to question jurors directly. See Hon. Gregory E. Mize et al., *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report* 27-28 (2007), http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx (identifying 41 States). And in the federal system, where "judge-conducted voir dire is the norm," *id.* at 27, litigants must be allowed to submit questions for consideration, Fed. R. Crim. P. 24(a); Fed. R. Civ. P. 47(a), and judges have been exhorted to permit questioning concerning race if requested by the defendant, even when it is not constitutionally required, *Ristaino*, 424 U.S. at 597 n.9.

Petitioner also argues that voir dire is an ineffective safeguard against racial bias because questioning in this area might raise "an issue defense counsel does not want to highlight." Br. 25 (citations omitted). Of course, counsel might hesitate to ask about numerous

subjects for fear of giving rise to prejudice through questioning itself. For instance, counsel might hesitate to ask jurors whether they would be influenced by a civil defendant's insurance coverage or to ask whether jurors would interpret one criminal defendant's guilty plea to implicate another defendant. Cf. Fed. R. Evid. 606(b) advisory committee's note (providing these examples of inappropriate jury-room considerations concerning which Rule 606(b) would bar inquiry).

But insofar as petitioner is suggesting that counsel may not "want to highlight" race because inquiries about racial bias might give rise to racial prejudice, research indicates the opposite. Studies indicate that questioning concerning racial attitudes reduces the likelihood that jurors will act on implicit prejudices. See Samuel R. Sommers & Phoebe C. Ellsworth, Symposium, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 Chi.-Kent L. Rev. 997, 997-1011 (2003); see also Regina A. Schuller et al., *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 Law & Hum. Behav. 320, 326 (2009). Indeed, recent research indicates that making race salient—as voir dire questioning does—reduces prejudice even in individuals who harbor explicit racial biases. Ellen S. Cohn et al., *Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes*, 39 J. Applied Soc. Psychol. 1953 (2009).

Petitioner finally asserts (Br. 26-27) that social opprobrium attached to racist views makes direct questioning ineffective at identifying those with racist attitudes. But petitioner's attempt to discount voir dire on this basis runs contrary to this Court's long-

standing treatment of voir dire as a constitutionally significant safeguard with respect to racial bias. And it fails to account for techniques beyond direct questions in front of the venire that are designed—when paired with the sanctity of jurors' oaths and the penalties of perjury and contempt—to elicit truthful answers to sensitive questions. See p. 25-26, *supra*; see also Resp. Br. 26 (noting that practice guides on which petitioner himself relies recommend a variety of voir dire techniques for probing bias). Given the strategies that courts and attorneys have developed to identify prejudiced jurors, petitioner offers little reason to imagine that, contrary to this Court's precedents, voir dire is particularly ineffective in identifying jurors who are racially biased.

b. In upholding applications of Rule 606(b) against Sixth Amendment challenges, this Court has emphasized that the right to a fair and impartial jury is also protected by additional safeguards during trial. *Warger*, 135 S. Ct. at 529; *Tanner*, 483 U.S. at 127. Those safeguards are just as effective against racial bias as they are against other forms of jury misconduct to which Rule 606(b) has long been applied.

i. The foremost safeguard against jury misconduct during trial is the ability of jurors to call the court's attention to prejudicial statements or other misconduct before a verdict is entered. There is no reason to treat this in-trial safeguard as less effective with respect to racial bias than with respect to other forms of prejudice or misconduct—such as the pro-defendant bias alleged in *Warger*, the quotient-verdict method alleged in *McDonald*, and the coin-flip decision-making in *Vaise*.

Petitioner hypothesizes (Br. 22) that jurors might be less likely to report racial bias than other forms of misconduct because "jurors may not realize that racially biased statements made during deliberations are legally impermissible." But review of jury instructions reveals that the opposite is true: Jurors are likely to be especially aware that decision-making based on bias is prohibited, because jurisdictions overwhelmingly provide express instructions on this point. The leading federal instructions specify that the jury must perform its duties "without bias or prejudice to any party." 1 Leonard B. Sand, et al., *Modern Federal Jury Instructions: Criminal* ¶ 2.01, Instruction 2-3, at 2-8 (2016); see *id.* ¶ 2.01, Instruction 2-11, at 2-22 ("It would be improper for you to consider * * * any personal feelings you may have about the defendant's race."). Circuit instructions follow suit. App. B, *infra*, 9a. The pattern instructions of 42 States also contain specific warnings on prejudice. *Id.* at 10a-13a. And States that do not specifically warn about prejudice typically tell jurors to reach their verdict fairly, impartially, or based only on the facts and law. *Id.* at 14a. These instructions are reinforced by what petitioner acknowledges (Br. 27) are exceptionally strong social norms against racial biases—norms that make such bias particularly likely to spur outrage and action.

Petitioner next asserts (Br. 23) that jurors are unlikely to report bias during trial because making such reports could cause "social anxiety" or "embarrassment," and because jurors are unlikely to want to "stir[] unwanted conflict." Reporting to a trial court that another juror is disregarding the court's instructions may indeed cause social tension. But this is true

of all types of reporting of misconduct by jurors. It could be "embarrass[ing]" and "stir[] unwanted conflict" to report a fellow juror's drug or alcohol use as in *Tanner*, or to report comments evidencing that a fellow juror lied in voir dire as in *Warger*, yet this Court concluded that reporting by fellow jurors is a significant safeguard with respect to those forms of juror misconduct.

Finally, were there doubt about whether jurors would report racial bias during trial, it would be resolved by the many reported cases in which jurors have done just that. These include respondent's examples (Br. 31-32 n.10), and many others, *e.g.*, *United States* v. *Sotelo*, 97 F.3d 782, 794-979 (5th Cir.), cert. denied, 519 U.S. 1045 (1996), 519 U.S. 1135, and 520 U.S. 1149 (1997); *Turner* v. *Pollard*, No. 13-CV-731, 2014 WL 5514169, at *2 (E.D. Wis. Oct. 31, 2014); *Love* v. *Yates*, 586 F Supp. 2d 1155, 1184-1188 (N.D. Cal. 2008); *Bryant* v. *Mattel, Inc.*, No. 04-CV-09049, 2008 WL 3367605 (C.D. Cal. Aug. 8, 2008); *People* v. *Wilson*, 187 P.3d 1041, 1076-1089 (Cal. 2008); *People* v. *Stevens*, No. A119073, 2012 WL 758035, at *2-4, *13-16 (Cal. Ct. App. Mar. 9, 2012); *State* v. *Miera*, 966 P.2d 1115, 1115 (Idaho Ct. App. 1998) (per curiam); *State* v. *Jones*, 29 So. 3d 533, 535 (La. Ct. App. 2009). These decisions confirm that jurors' reporting of misconduct during trial can protect against racially biased conduct in the jury room—just as it can protect against other forms of bias and misconduct that are contrary to the Sixth Amendment.

ii. Courts' ability to uncover misconduct during trial through juror reporting is supplemented by their ability to receive reports from those outside the jury —such as attorneys, observers, and court staff.

Warger, 135 S. Ct. at 529; *Tanner*, 483 U.S. at 127. Of course, non-jurors will rarely have a window into displays of bias or misconduct occurring within the jury room itself—whether the conduct in question is coin-flip decision-making, *Vaise*, *supra*, use of a quotient-verdict method, *McDonald*, *supra*, expressions of pro-defendant bias, *Warger*, *supra*, or expressions of racial prejudice. But it is far from unheard-of for jurors with prejudiced reactions to events during trial to express them outside the jury room—as demonstrated by cases in respondent's brief (Br. 35), and numerous others, *e.g.*, *Thompson* v. *Quarterman*, 629 F Supp. 2d 665, 676-679 (S.D. Tex. 2007); *United States* v. *Patterson*, No. 04-CR-705-1, 2007 WL 1438658, at *4-5, *21-23 (N.D. Ill. May 15, 2007), aff'd 397 Fed. Appx. 209 (7th Cir. 2010); *Jimenez* v. *Heyliger*, 792 F. Supp. 910, 916-919 (D.P.R. 1992); *People* v. *Jones*, 475 N.E.2d 832, 836-837 (Ill. 1985); *State* v. *Evans*, 756 N.W.2d 854, 862-871 (Minn. 2008); *State* v. *Varner*, 643 N.W.2d 298, 302-305 (Minn. 2002). This Court has accordingly treated reporting during trial from outside observers as one of the safeguards of the right to a fair and impartial jury even when addressing claims of partiality relating to juror attitudes. *Warger*, 135 S. Ct. at 529.

c. Finally, this Court has emphasized in upholding applications of Rule 606(b) that a litigant may seek to impeach a verdict after trial based on a Sixth Amendment claim, so long as its challenge is based on "nonjuror evidence of misconduct." *Tanner*, 483 U.S. at 127. If anything, it is far more likely that nonjuror evidence of racial biases will exist than, for example, nonjuror evidence that a juror would resort to coin-

flipping or other arbitrary decision-making methods in the jury room.

A juror who expresses racial bias in the jury room will often express such bias outside the jury room as well. And when a juror's statements outside the courtroom indicate that he misrepresented his ability to be fair and impartial during voir dire, a litigant may bring a Sixth Amendment challenge based on that evidence. *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 556 (1984) (explaining that a litigant is entitled to a new trial when a litigant "demonstrate[s] that a juror failed to answer honestly a material question on *voir dire*, and then further show[s] that a correct response would have provided a valid basis for a challenge for cause"). Petitioner offers no reason to believe that this type of non-juror evidence is peculiarly unlikely to be available for racial prejudice.

Petitioner instead suggests (Br. 28-29) that nonjuror evidence will not help safeguard against racial bias because courts have interpreted Rule 606(b) as barring "non-jurors from testifying to statements uttered by jurors even when made outside of the courthouse." Br. 28. But Rule 606(b) bars only nonjuror testimony that recounts statements jurors made about matters or statements "occurring during the course of the jury's deliberations," or about jurors' reasoning or mental processes in the deliberations themselves. Colo. R. Evid. 606(b); see, *e.g.*, *United States* v. *Voigt*, 877 F.2d 1465, 1469 (10th Cir.), cert. denied, 493 U.S. 982 (1989); *Fulghum* v. *Ford*, 850 F.2d 1529, 1535 (11th Cir. 1988), cert. denied, 488 U.S. 1013 (1989). The rule therefore does not generally prevent parties from using nonjuror evidence to es-

tablish that a juror harbored racist beliefs, and therefore should have been struck for cause. See, *e.g.*, *United States* v. *Henley* 238 F.3d 1111, 1120 (9th Cir. 2001), abrogated on other grounds by *Warger*, 135 S. Ct. 524.

3. Because the Sixth Amendment forbids all forms of partiality and misconduct, no race-specific rule is appropriate

The Sixth Amendment does not support departing from the framework set out in *Tanner* when the type of juror partiality alleged is racial bias, rather than other misconduct or prejudice. That Amendment, on which petitioner's claim rests, guarantees every defendant the right to a fair and impartial jury. U.S. Const. Amend VI. That is, it guarantees "a jury capable and willing to decide the case solely on the evidence before it." *McDonough*, 464 U.S. at 554 (citation omitted). The Sixth Amendment is thus violated when jurors decide a case using any criterion other than the law and evidence—from prejudice relating to race, to prejudice for or against particular classes of litigants, *Warger*, *supra*, to arbitrary decision-making methods like drawing lots, *Vaise*, *supra*, or trading a conviction of one defendant for an acquittal of another, *Hyde*, *supra*. The Sixth Amendment does not support treating some litigants differently from others on the theory that different prejudices or arbitrary decision-making criteria are more or less consistent with the Sixth Amendment's commands.

The decisions under the Equal Protection Clause that petitioner invokes (Br. 43) in urging this Court to create "special categories of bias" under the Sixth Amendment are inapposite. Under the Equal Protection Clause, States are generally forbidden from mak-

ing decisions based on classifications subject to heightened scrutiny. For instance, the Equal Protection Clause is violated when a litigant makes peremptory challenges based on race, *Batson* v. *Kentucky*, 476 U.S. 79, 85-98 (1986), or gender, *J.E.B.* v. *Alabama*, 511 U.S. 127, 129 (1994), but no violation occurs when a litigant uses some other criterion, such as when a litigant strikes "any group or class of individuals normally subject to 'rational basis' review," *id.* at 143. That framework differs from the distinct protections of the Sixth Amendment, which bar decisionmaking based on *any* bias, prejudice, or arbitrary method. Given the Sixth Amendment's broad protections against any bias or prejudice, petitioner errs in counseling different analyses under that provision depending on the type of partiality that a litigant asserts.

CONCLUSION

The judgment of the Colorado Supreme Court should be affirmed.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
RACHEL P KOVNER
Assistant to the Solicitor General
WILLIAM A. GLASER
Attorney

SEPTEMBER 2016

APPENDIX A

Federal District Court Rules Barring Litigants From Contacting Jurors Following Trial Without Judicial Permission Or Barring Jurors From Disclosing Deliberations

Alabama:	M.D. Ala. Local Rule 47.1 (permission from judge)
	S.D. Ala. Local Rule 47(e) (permission from judge following notice to opponent and showing of good cause)
Alaska:	D. Alaska Local Civil Rule 83.1(h) (permission from judge); see D. Alaska Local Criminal Rule 1.1(b) (specifying that civil rules apply in criminal proceedings where appropriate)
Arizona:	D. Ariz. Local Civil Rule 39.2(b) & Local Criminal Rule 24.2 (permission from judge within time for moving for new trial, based upon good cause and review of proposed interrogatories)
Arkansas:	E.D. & W.D. Ark. Local Rule 47.1 (permission from judge)
Colorado:	D. Colo. Local Civil Rule 47.2 & Local Criminal Rule 24.1 (permission from judge)

Connecticut:	D. Conn. Local Rule 83.5 (barring jurors from disclosing deliberations of jury, votes of jury, or actions or comments of other jurors, except that jurors must report extraneous information, outside influence, or clerical mistakes)
Delaware:	D. Del. Local Civil Rule 47.2 (permission from judge)
District of Columbia:	D.D.C. Local Civil Rule Columbia 47.2(b); Local Criminal Rule 24.2(b) (permission of judge, based on showing of good cause after jury discharge)
Florida:	M.D. Fla. Local Rule 5.01(d) (permission from judge based on motion explaining grounds for belief that verdict is subject to challenge)
	S.D. Fla. Local Rule 11.1(e) (permission from judge based on showing of good cause)
Georgia:	N.D. Ga. Local Civil Rule 47.3 & Local Criminal Rule 47.3 (permission from judge)
	M.D. Ga. Local Civil Rule 48.3 & Local Criminal Rule 31.1 (permission from judge)

	S.D. Ga. Local Rule 83.8 (permission from judge)
Illinois:	N.D. Ill. Local Civil Rule 48.1 & Local Criminal Rule 31.1 (permission from judge)
	C.D. Ill. Local Rule 47.2(2) (permission from judge)
	S.D. Ill. Local Rule 53.1 (permission from judge)
Indiana:	N.D. Ind. Local Civil Rule 47-2 (permission from judge and notice to other parties)
	S.D. Ind. Local Rule 47-2 (permission from judge; showing of good cause required in criminal cases)
Iowa:	N.D. & S.D. Iowa Local Rule 47; Local Criminal Rule 24.1 (permission from judge)
Kansas:	D. Kan. Local Rule 47.1 (permission from judge; jurors may not disclose "the deliberations of the jury")
Kentucky:	E.D. Ky. Local Civil Rule 47.1(a); Local Criminal Rule 24.1 (permission from judge)
	W.D. Ky. Local Civil Rule 47.1(a); Local Criminal Rule 24.1 (permission from judge)

Louisiana:	E.D. La. Local Civil Rule 47.5; Local Criminal Rule 23.2 (permission from judge)
	M.D. La. Local Civil Rule 47(e); Local Criminal Rule 24 (permission from judge based on showing of good cause; jurors prohibited from disclosing jury deliberations, evidence of improprieties in jury deliberations, or the specific vote of any juror other than the juror being interviewed)
	W.D. La. Local Rule 47.5 (permission from judge based on showing of good cause; jurors prohibited from disclosing jury deliberations, evidence of improprieties in jury deliberations, or the specific vote of any juror other than the juror being interviewed)
Maryland:	D. Md. Local Rule 107(16) (permission from judge)
Mississippi:	N.D. & S.D. Miss. Local Civil Rule 48 (permission from judge based on showing of good cause); see N.D. & S.D. Miss. Local Criminal Rule 1 (specifying that civil rules apply in criminal proceedings where appropriate)

Missouri:	E.D. Mo. Local Rule 47-7.01(B)(1) (permission from judge)
Montana:	D. Mont. Local Civil Rule 48.1; Local Criminal Rule 24.2 (permission from judge within the time for moving for a new trial, based on showing of good cause and review of proposed interrogatories)
New Hampshire:	D.N.H. Local Rule 47.3 (permission from judge to be granted only "in extraordinary circumstances and for good cause shown")
New Jersey:	D.N.J. Local Civil Rule 47.1(e); Local Criminal Rule 24.1(g) (permission from judge based on showing of good cause)
North Carolina:	W.D.N.C. Local Civil Rule 47.1(D) (permission from judge based on showing of good cause)
Ohio:	S.D. Ohio Local Rule 47.1 (permission from judge)
Oklahoma:	E.D. Okla. Local Rule 47.1 (permission from judge)
	N.D. Okla. Local Civil Rule 47.2; Local Criminal Rule 24.2 (permission from judge)

	W.D. Okla. Local Civil Rule 47.1; Local Criminal Rule 53.3 (permission from judge)
Oregon:	D. Or. Local Civ P 48-2 (permission from judge)
Pennsylvania:	E.D. Pa. Criminal Rule 24.1(c) (permission from judge)
	M.D. Pa. Local Rule 83.4 (permission from judge)
Puerto Rico:	D.P.R. Local Civil Rule 47(c)-(d); Local Criminal Rule 124(e) (communication barred unless under supervision of the court)
Rhode Island:	D.R.I. Local Civil Rule 47(d); Local Criminal Rule 24(g) (permission from judge)
South Dakota:	D.S.D. Local Civil Rule 47.2 & Local Criminal Rule 24.2 (permission from judge)
Tennessee:	E.D. Tenn. Local Rule 48.1 (permission from judge)
	M.D. Tenn. Local Rule 39.01(f)(2) (permission from judge)
	W.D. Tenn. Local Rule 47.1(e)-(f) (permission from judge based on motion that states ground and purpose, except in cases of mistrial)

Texas:	E.D. Tex. Local Civil Rule 47(b); Local Criminal Rule 24(a)(2) (permission from judge)
	N.D. Tex. Local Civil Rule 47.1; Local Criminal Rule 24.1 (permission from judge)
	S.D. Tex. Local Rule 47 (permission from judge)
Vermont:	D. Vt. Local Rule 83.5 (permission from judge)
Virgin Islands:	D. V.I. Local Rule 47.1 (permission from judge)
Virginia:	E.D. Va. Local Civil Rule 47(c); Local Criminal Rule 24(c) (permission from judge, based on showing of good cause)
Washington:	E.D. Wash. Local Rule 47.1(d) (permission from judge)
	W.D. Wash. Local Civil Rule 47(d); Local Criminal Rule 31(e) (permission from judge)
West Virginia:	N.D. W. Va. Local Rule Gen. Practice 47.01 (permission from judge)
	S.D. W. Va. Local Rule Civ. P 48.1; Local Rule Crim. P. 31.1 (permission from judge, based on showing of good cause)

Wisconsin:	E.D. Wis. Gen. Local Rule 47(c) (permission from judge, based on showing of good cause)
	W.D. Wis. Local Rule 4 (LR 47.2) (permission from judge)
Wyoming:	D. Wyo. Local Rule 47.2(b)-(c); Local Criminal Rule 24.1(c) (banning jurors from disclosing the deliberations of the jury or the vote of any juror other than the juror being interviewed)

APPENDIX B

1. Pattern Jury Instructions That Advise Jurors To Set Aside Biases And Prejudices

A. Federal Courts

First Circuit:	Pattern Jury Instructions, First Circuit 3.01 (1998)
Third Circuit:	Third Circuit Manual of Modern Jury Instructions–Criminal 3.01 (2015)
Fifth Circuit:	Pattern Jury Instructions, Criminal Cases 1.04 (2015)
Sixth Circuit:	Pattern Criminal Jury Instructions 1.02 (2013)
Seventh Circuit:	Federal Criminal Jury Instructions of the Seventh Circuit 1.01 (2012)
Eighth Circuit:	Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit 3.02 (2014)
Ninth Circuit:	Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit 1.1 (2010)
Tenth Circuit:	Criminal Pattern Jury Instructions (Tenth Circuit) 1.04 (2011)
Eleventh Circuit:	Eleventh Circuit Pattern Jury Instructions 2.1 (Criminal Cases) (2010)

B. State Courts

Alaska:	Alaska Criminal Pattern Jury Instructions 1.07 (2011)
Arizona:	Criminal Revised Arizona Jury Instructions, Preliminary Criminal 2 Duty of Jurors (3d ed. 2014)
Arkansas:	Arkansas Model Jury Instructions—Criminal 101 (2d ed. 2016)
California:	California Jury Instructions —Criminal 1.00, 17.50 (West 2016)
Colorado:	Colorado Jury Instructions—Criminal E:01 (2015)
Connecticut:	Connecticut Judicial Branch Criminal Jury Instructions 2.1-2 (2014)
Delaware:	Pattern Criminal Jury Instructions of the Superior Court of the State of Delaware 2.2 (2016)
Florida:	Florida Standard Jury Instructions in Criminal Cases 3.10 (2015)
Georgia:	2 Georgia Suggested Pattern Jury Instructions—Criminal 1.70.11 (2016)
Hawaii:	Hawai'i Pattern Jury Instructions—Criminal 3.03 (2014)

Idaho:	Idaho Criminal Jury Instructions 104 (2010)
Illinois:	Illinois Pattern Criminal Jury Instructions 1.01 (2014)
Indiana:	Indiana Pattern Jury Instructions (Criminal) Instruction No. 13.1500 (2016)
Louisiana:	17 Louisiana Civil Law Treatise, Criminal Jury Instructions 3.8 (3d ed. 2015)
Maine:	1-6 Maine Jury Instruction Manual 6-2 (2016)
Maryland:	Maryland Criminal Pattern Jury Instructions 2.04 (2d ed. 2013)
Massachusetts:	Massachusetts, Criminal Model Jury Instructions for Use in the District Court, Instruction 2.120 (2009)
Michigan:	Michigan Model Criminal Jury Instructions 3.1 (2004)
Minnesota:	10 Minnesota Practice Series, Jury Instruction Guides—Criminal 1.01 (6th ed. 2016)
Mississippi:	Mississippi Plain Language Model Jury Instructions—Criminal 101 (2012)
Missouri:	Missouri Approved Instructions—Criminal 302.01 (3d ed. 1986)

Montana:	Montana Criminal Jury Instruction, Instruction No. 1-102 (2009)
Nebraska:	Nebraska Jury Instructions—Criminal 1.0 (West 2010)
New Hampshire:	New Hampshire Criminal Jury Instructions—1985, Instruction 1.01
New Jersey:	New Jersey Standard Crim. Jury Instruction, Non 2C Charges, Instructions After Jury Is Sworn (2012)
New Mexico:	New Mexico Uniform Jury Instructions—Criminal 14-101 (2011)
New York:	Charges to Jury and Request to Charge in Criminal Case in New York—Reasonable Doubt (2016)
North Carolina:	North Carolina Pattern Jury Instructions for Criminal Cases 100.25 (2013)
North Dakota:	North Dakota Pattern Jury Instructions—Criminal 1.03 (2016)
Ohio:	2 Ohio Jury Instructions—Criminal 425.35 (West 2016)
Oklahoma:	Oklahoma Uniform Jury Instructions—Criminal 11-6 (2016)

Oregon:	1 Oregon Uniform Criminal Jury Instructions 1005 (2011)
Pennsylvania:	Pennsylvania Suggested Standard Criminal Jury Instructions 7.05 (3d ed. 2016)
South Dakota:	South Dakota Pattern Jury Instructions Criminal 1-17-1 (2015)
Tennessee:	Tennessee Pattern Jury Instructions—Criminal 43.04 (2015)
Texas:	Texas Criminal Pattern Jury Charges—Crimes Against Persons and C2.1 (2011)
Utah:	Model Utah Jury Instructions —Criminal 202 (2d. ed. 2014)
Vermont:	Vermont Model Criminal Jury Instructions CR02-111 (2003)
Washington:	Washington Pattern Jury Instructions—Criminal 1.02 (2014)
West Virginia:	West Virginia Criminal Jury Instructions 4.01 (6th ed. 2003)
Wisconsin:	Wisconsin Jury Instructions —Criminal 50 (2010)
Wyoming:	Wyoming Criminal Pattern Jury Instructions 1.02 (2014)

2. Additional State Courts That Direct Jurors to Reach Their Verdict Fairly, Impartially, or Based Only on the Facts and the Law

Alabama:	Alabama Pattern Jury Instructions—Criminal Proceedings I.2, I.4 (2014)
Iowa:	Iowa Criminal Jury Instructions 100.18 (2013)
Kansas:	Pattern Instructions Kansas—Criminal 68.010 (2016)
Kentucky:	1-2 Cooper and Cetrulo, Kentucky Jury Instructions 2.02 (2016)
South Carolina:	Anderson's South Carolina Requests to Charge—Criminal 1-1 (2d ed. 20112)
Virginia:	Virginia Model Jury Instructions—Criminal, Instruction No. 2.100 (2015)

APPENDIX C

Federal Rule of Evidence 606(b) provides:

(b) During an Inquiry Into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.